

APR 20 1984

ALEXANDER L. STEVENS
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IN THE

Supreme Court of the United States

OCTOBER TERM 1983

THE MACON TELEGRAPH PUBLISHING COMPANY

Petitioner,

v.

BETTY H. ELLIOTT

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF GEORGIA**

REPLY BRIEF OF PETITIONER

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REPLY TO RESPONDENT'S COUNTER-STATEMENT OF THE CASE

In setting out her "counter-statement of the case," Respondent has taken great liberty with the actual facts as reflected in the record. Respondent's statements concerning the case are not an accurate reflection of the record developed in the trial and appellate courts. ~~Petitioner~~ must respond to put the statement of the case in a proper light before this Court.

Respondent begins her brief by stating that the allegedly libelous article "accused Respondent with improper conduct as a juror during a double murder trial." (Brief for Respondent at page 1). Later in her brief, she describes the alleged libel as an "accusation that she had violated her oath and made up her mind in the middle of the trial." (Brief for Respondent at page 4). As the Court can determine by reading the exact words that Respondent claims defamed her (see Petition For Writ of Certiorari at pages 3-4), *nowhere* does the article accuse Respondent of improper conduct or of violating her oath as a juror.

On page 1 of Respondent's brief, the following statement appears:

The evidence clearly showed that Respondent did not talk to the reporter at all about when she made up her mind to vote, was not even remotely asked a question concerning when she made up her mind, and that she had not, in fact, made up her mind a day or two before the case went to the jury.

On page 2 of Respondent's Brief, it is stated:

Despite that, the reporter fabricated a story which was published the next day stating that Respondent decided to vote not guilty a day or two before the case went to the jury.

The above quotes from Respondent's brief are not accurate representations of the record in the case. Far from being clear, the evidence concerning the substance of the interview between Petitioner's reporter and the Respondent was diametrically conflicting. In addition, the allegedly libelous article does not state "that Respondent decided to vote not guilty a day or two before the case went to the jury." See pages 3-4 and 21-22 of the Petition For Writ of Certiorari for a detailed discussion of the content of the article.

Finally, on page 2, Respondent states: "The Supreme Court of the State of Georgia then granted and later vacated a Writ of Certiorari in which Petitioner attempted to inject for the first time issues of a constitutional nature."

The issues raised in the Writ of Certiorari to the Georgia Supreme Court were raised at the trial level and at every stage of the appellate argument as more particularly hereinafter shown.¹

REPLY TO RESPONDENT'S REASONS FOR NOT GRANTING THE WRIT

I. THE QUESTION WHETHER THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES WAS VIOLATED BY THE PROCEEDINGS AND VERDICT IN THIS CASE WAS RAISED AT EVERY POSSIBLE POINT IN THE STATE TRIAL AND APPELLATE COURT PROCEEDINGS.

In Section A of her brief on page, 3, Respondent states:

The statutory requirements that Petitioner adequately present a federal question which is ruled on by the State Court has not been met in this case.

¹ Respondent points out in her Counter-Statement of the case that the judgment was paid following this Court's denial of the Petition for Stay. The Petitioner paid the judgment under protest, and only after it had exhausted every possibility for obtaining a stay.

This is not an accurate statement of the record as can be illustrated by the following examples of what in fact transpired in the trial and appellate proceedings. The record will show that Petitioner requested the trial court to give the following charges, labelled Petitioner's Requests to Charge Nos. 13, 14, 16 and 18. The requested charges were as follows:

Petitioner's Request to Charge No. 13, based on the decision of this Court in *Garrison v. Louisiana*, 379 U.S. 64 (1964), as followed by the Georgia courts in *Williams v. Trust Company of Georgia*, 140 Ga.App. 49 (1976), read:

Members of the jury, actual malice has been further defined as the use of a calculated falsehood which has been knowingly and deliberately published with a high degree of awareness of its probable falseness. The Plaintiff must produce sufficient evidence to permit you to come to the conclusion that Defendant in fact entertained serious doubts as to the truth of the publication.

Petitioner's Request to Charge No. 14, based on the decision of this Court in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 153 (1967), read as follows:

Members of the jury, the constitutional standard of actual malice requires that the Plaintiff prove that the publication in question was deliberately falsified, or published recklessly despite the publisher's awareness of probable falsity.

Petitioner's Request to Charge No. 16, based on the decision of this Court in *New York Times v. Sullivan*, 376 U.S. 254, 287 (1964), read as follows:

Members of the jury, the mere fact that the writer of the article made a mistake in reporting the substance of the interview with Plaintiff does not establish that Defendant newspaper 'knew' that the story was false, since the state of mind required for actual malice would have to be brought home to the persons in Defendant's organization having responsibility for the publication of the article.

Petitioner's Request to Charge No. 18, based on the decision of this Court in *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), as adopted in Georgia in *Williams v. Trust Company of Georgia*, 140 Ga.App. 49, 55 (1976), read as follows:

Members of the jury, in deciding if the Defendant newspaper is guilty of actual malice, Defendant's conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing, but there must be sufficient evidence to permit the conclusion that the Defendant newspaper entertained serious doubts as to the truth of its publication.

On pages 223-226 of the trial transcript, the Petitioner objected to the trial court's failure to give these charges on the grounds that they were correct statements of law from the cases cited and were applicable to the facts. The trial court overruled the objections. In Petitioner's Amended Motion For New Trial, at pages 12-15, Petitioner cited the trial court's failure to give these charges as error on the ground that they were necessary to give the jury a correct statement of the Constitutional definition of "actual malice."

The Enumerations of Error in the Georgia Court of Appeals, attached to Respondent's brief as Appendix A, shows that Enumerations of Error 5(n), 5(o), 5(p) and 5(q) were addressed to the trial court's refusal to give these charges. As shown in Appendix D to the Petition For Certiorari at page 8d, the Georgia Court of Appeals in Section 8 of its Opinion summarily dismissed these Enumerations of Error as being "not meritorious."

Petitioner moved for a rehearing before the Court of Appeals of Georgia, and in Section 8 of its Motion, Petitioner requested a rehearing with regard to each and every allegation of error made by Petitioner which had not been addressed by the court. Petitioner showed that it was unable to comply with Rule 48(f) of the Georgia Court of Appeals (which requires an appellant to point out whether the court overlooked a material

fact in the record, a statute, or a controlling decision that would require a different judgment from that rendered, or whether the court had erroneously construed or misapplied a provision of law or controlling authority) because the Court of Appeals had not stated in its Opinion how the Enumerations of Error raised by Petitioner were resolved or why they were not meritorious. The Georgia Court of Appeals denied Petitioner's Motion For Rehearing except to the extent of revising its discussion of actual malice.

Petitioner next made application to the Supreme Court of Georgia for a Writ of Certiorari and among the issues briefed for the Georgia Supreme Court were (1) whether punitive damages may be constitutionally recovered in a libel case involving a private plaintiff absent clear and convincing evidence of malice and (2) whether the actions of a reporter and employee may be imputed to the publisher under the respondent superior doctrine in light of applicable decisions of this Court. The Writ was granted and then later vacated by the Supreme Court of Georgia. Petitioner's Motion For Rehearing on the decision to vacate the Writ was denied.

As the procedural history of Petitioner's Requests to Charge Nos. 13, 14, 16 and 18 in the state and appellate courts of Georgia demonstrates, questions of whether the trial court correctly charged the jury on the issues of actual malice, as required under the United States Constitution, were raised in the first instance in the trial court by Petitioner's objection to the trial court's failure to give Petitioner's Requests to Charge and were raised at every level of the state appellate process as well.

Respondent has attached to her own brief a copy of Petitioner's Enumerations of Error in the Court of Appeals of Georgia which shows on its face that error was assigned to the trial court's failure to give these charges. Had the issues raised by these requests to charge not been properly raised in the trial court and in the Court of Appeals, the Court of Appeals would not have considered them even to the extent of summarily finding them "not meritorious."

The foregoing illustrates that Respondent's statement that Petitioner has not met the standard of review for a final judgment of a state court as governed by 28 U.S.C. § 1257 is not accurate and is a misrepresentation of the record compiled in the trial and appellate courts.

II. RESPONDENT'S ARGUMENT THAT THE ACTUAL MALICE REQUIREMENTS OF THE UNITED STATES CONSTITUTION HAVE BEEN SATISFIED IS BASED ON DISTORTION OF THE FACTS IN THE RECORD AND ON MISREPRESENTATION OF CASE AUTHORITY.

Respondent has irresponsibly and inaccurately stated that Petitioner's article accused her of improper conduct in violation of her oath and of having made up her mind in the middle of the trial. Moreover, Respondent has totally mischaracterized the holding and authority of *Garland v. State*, 211 Ga. 48 (1954). In *Garland*, the Supreme Court of Georgia considered whether the Defendant's words "I know the jury, composed of fine men, did not even deliberate on the case—the verdict was already made" were defamatory as to the jurors collectively or individually. The Court held they were not. The Court said that these words meant "that the defendant had charged the jury with arriving at a verdict by each member voting for conviction without discussing the evidence or deliberating before casting their votes for conviction." *Id.*, at 50. The Court was thus not called upon to decide whether an accusation that a juror had made up his mind in the middle of a trial is defamatory. The Court's statement that "... a juror should not make up his mind as to the guilt or innocence of the prisoner until all the evidence has been submitted and the court has instructed the jury as to the law . . .", *Id.*, is therefore, at most, dictum. But even if this language from *Garland* were holding and not dictum, it would not control this case because the allegedly libelous statement here does *not* charge the Respondent with having made up her mind that the Defendant was innocent before all the evidence had been submitted and the court had given its instructions. (See Petition For Writ of Certiorari, pages 3-4).

CONCLUSION

For the reasons set forth herein and in the Petition For Writ of Certiorari, the Petition For Certiorari to the Supreme Court of Georgia should be granted.

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